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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MEMORANDUM

SUBJECT: Interim Policy on Stack Height Regulatory Actions

FROM: J. Craig Potter
Assistant Administrator
for Air and Radiation (ANR-443)

TO: Director, Air Management Division
Regions I, III, IX
Director, Air and Waste Management Division
Region II
Director, Air, Pesticides, and Toxics Management Division
Regions IV, VI
Director, Air and Radiation Division
Region V
Director, Air and Toxics Division
Regions VII, VIII, X

On January 22, 1988, the U.S. Court of Appeals for the District of Columbia issued its decision in NRDC v. Thomas, 838 F.2d 1224 (D.C. Cir. 1988), regarding the Environmental Protection Agency's (EPA's) stack height regulations published on July 8, 1985 (50 FR 27892). Subsequent petitions for rehearing were denied. Although the court upheld most provisions of the rules, three portions were remanded to EPA for review:

1. Grandfathering pre-October 11, 1983 within-formula stack height increases from demonstration requirements [40 CFR 51.100(kk)(2)];
2. Dispersion credit for sources originally designed and constructed with merged or multiflue stacks [40 CFR 51.100(hh)(2)(ii)(A)]; and
3. Grandfathering of pre-1979 use of the refined $H + 1.5L$ formula [40 CFR 51.100(ii)(2)].

A number of pending State implementation plan (SIP) and other rulemaking actions may be affected by this decision in advance of EPA's promulgation of further revisions of the stack height regulations. This includes not only rulemaking packages developed to respond to the 1985 stack height regulations, but also such actions as issuance of new source review (NSR) and prevention of significant deterioration (PSD) permits, permit modifications, SIP revisions

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dealing with specific source emission limitations, and redesignation under section 107 of the Clean Air Act. Consequently, until resolution of litigation and completion of any rulemaking activity to respond to the court decision, the following policy will be applied.

In general, actions to approve States' rules may proceed provided appropriate caveat language is inserted which notes that the action is potentially subject to review and modification as a result of the recent court decision. Actions addressing State permitting authority should require States to provide notice that permits are subject to review and modification if sources are later found to be affected by revisions to stack height regulations. Where States currently have the authority to issue

permits under fully-approved or delegated NSR and PSD programs, any permits Issued prior to EPA's promulgation of revised stack height regulations should provide notice as described above that they may be subject to review and modification. Regional Office staff are requested to contact their State officials and notify them accordingly. Where EPA has retained authority to issue permits, it should also insert appropriate cautionary language in the permit.

The EPA will try to avoid taking source-specific actions that may need to be retracted later. Such actions may include certain emission limitations and good engineering practice demonstrations which reflect dispersion credit affected by the remand. The EPA may approve these State submittals on a case-by-case basis, with the explicit caution that they and the sources affected by them may need to be evaluated for compliance with any later revisions to the stack height regulations, as a result of the litigation. The EPA will continue to process, under normal procedures, any source-specific actions which do not involve the remanded provisions.

Requests for redesignation of areas from nonattainment to attainment which are affected by any of the remanded provisions of the stack height regulations will be put on hold until EPA has completed any rulemaking necessary to comply with the court's remand. This is due to the issue of whether EPA has authority to unilaterally change attainment designations.

During this interim period, the Regional Office staff should review with their States all regulatory actions involving dispersion credit: and identify those actions or sources affected by the remanded provisions. The Region should consult with their States on appropriate action for all such packages, consistent with this policy.

If you have any questions regarding the application of this policy, please contact Doug Grano at FTS 629-0870 or Janet Metsa at FTS 629-5313.

cc: D. Clay
A. Eckert
J. Emison
D. Grano
J. Metsa

Attachment B

The following boilerplate, or variations tailored to suit particular situations, should be used in rulemaking actions affected by the stack height remand.

General Addition

"The EPA's stack height regulations were challenged in NRDC v. Thomas, 838 F.2d 1224 (D.C. Cir. 1988). On January 22, 1988, the U.S. Court of Appeals for the D.C. Circuit issued its decision affirming the regulations in large part, but remanding three provisions to the EPA for reconsideration. These are:

1. Grandfathering pre-October 11, 1983 within-formula stack height increases from demonstration requirements [40 CFR 51.100(kk)(2)];
2. Dispersion credit for sources originally designed and constructed with merged or multiflue stacks [40 CFR 51.100(hh)(2)(ii)(A)]; and
3. Grandfathering pre-1979 use of the refined $H + 1.5L$ formula [40 CFR 51.100(ii)(2)]."

Addition for Stack Heights-Rules Packages

"Although the EPA generally approves [State's] stack height rules on the grounds that they satisfy 40 CFR Part 51, the EPA also provides notice that this action may be subject to modification when EPA completes rulemaking to respond to the decision in NRDC v. Thomas, 838 F.2d 1224 (D.C. Cir. 1988). If the EPA's response to the NRDC remand modifies the July 8, 1985 regulations, the EPA will notify the State of [] that its rules must

be changed to comport with the EPA's modified requirements. This may result in revised emission limitations or may affect other actions taken by [State] and source owners or operators.

Additions for Stack Negative Declaration Packages

"The EPA is not acting on ____ sources (identified in table form or by asterisk) because they currently receive credit under one of the provisions remanded to the EPA in NRDC v. Thomas, 838 F.2d 1224 (D.C. Cir 1988). The [State] and EPA will review these sources for compliance with any revised requirements when the EPA completes rulemaking to respond to the NRDC remand."

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Additions for Stack Height Emission Limitation Changes or Good Engineering Practice Demonstration

The OAQPS and OGC will provide language on a case-by-case basis when the EPA is acting on a source-specific package which is affected by the remand.

Language for Proposed NSR and PSD SIP Approvals

"Under this program, [State] will be issuing permits and establishing emission limitations that may be affected by the court-ordered reconsideration of the stack height regulations promulgated on July 8, 1985 (50 FR 27892). For this reason, EPA requires that the State include the following caveat in all potentially affected permit approvals until the EPA completes its reconsideration of remanded portions of the regulations and promulgates any necessary revisions:

'In approving this permit, [name of agency] has determined that the application complies with the applicable provisions of the stack height regulations as revised by EPA on July 8, 1985 (50 FR 27892). Portions of the regulations have been remanded by a panel of the U.S. Court of Appeals for the D.C. Circuit in NRDC v. Thomas, 838 F.2d 1224 (D.C. Cir. 1988). Consequently, this permit may be subject to modification if and when EPA revises the regulation in response to the court decision. This may result in revised emission limitations or may affect other actions taken by the source owners or operators.'

[State] must make an enforceable commitment to include this caveat in all affected permits before the EPA can take final action approving the [NSR or PSD] program."

Language for Final NSR and PSD SIP Approvals

"Under this program, [State] will be issuing permits and establishing emission limitations that may be affected by the court-ordered reconsideration of the stack height regulations promulgated on July 8, 1985 (50 FR 27892). For this reason, the EPA has required that the State include the following caveat in all potentially affected permit approvals until the EPA completes its reconsideration of remanded portions of the regulations and promulgates any necessary revisions:

'In approving this permit, [name of agency] has determined that the application complies with the applicable provisions of the stack height regulations as revised by the EPA on July 8, 1985 (50 FR 27892). Portions of the regulations have been remanded by a panel of the U.S. Court of Appeals for the D.C. Circuit in NRDC v. Thomas, 838 F.2d 1224 (D.C. Cir. 1988). Consequently, this permit may be subject to modification if and when the EPA revises the regulations in

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response to the court decision. This may result in revised emission limitations or may affect other actions taken by the source owners or operators.

[State] has made an enforceable commitment to include this caveat in

all affected permits by letter dated []. This commitment is being incorporated into the Code of Federal Regulations for the State of [] as part of EPA's approval action."

See Attachment D for sample CFR amendment.

The Regional Offices are requested to contact those States that currently have permitting authority and request that they include similar language in any permits issued until EPA has completed its reconsideration of the stack height regulations and has promulgated any necessary revisions.

Attachment C

State	AQMD	Description	Disposition
AZ/CA/NV	3059	Promulgation of Stack Height Regs.	HQ
AZ/CA/NV	3210	App. and Disapp. of Stack Height Req.	RO
SC	3243	Negative Declaration	RO
MS	3330	Mississippi's Negative Declaration	RO
NJ/NY/VI	3418	Stack Height Revisions	RO
WA	3480	Stack Height Rules	HQ
MD	3543	Negative Declaration	RO
AR	3548	Stack Height Rules	HQ
OH	3570	Stack Height Regulations	HQ
TX	3572	Stack Height Regulations	HQ
LA	3592	Revisions to Stack Height Rules	HQ
DE	3600	Stack Height Regulations	HQ
OH	3334	Redesignation of Galia County to Attainment	Hold
SD	3618	Administrative Rules	RO
CO	3623	Negative Declaration	RO